

Citation: *E. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1477

Date: December 29, 2015

File number: AD-15-1115

APPEAL DIVISION

Between:

E. S.

Appellant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)**

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Decided on the record on December 29, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant claimed that she was disabled by a number of medical conditions including fibromyalgia, incontinence, back pain and a shoulder injury. She applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after reconsideration. The Appellant appealed the reconsideration decision to the General Division of the Social Security Tribunal. She completed her appeal beyond the time permitted to do so. The General Division of the Tribunal refused her request to extend the time to file her appeal. She requested and was granted leave to appeal the General Division decision to the Appeal Division of the Tribunal on the basis that the General Division decision may have contained an error in law.

STANDARD OF REVIEW

[2] The *Social Security Tribunal Regulations* provide that parties may file written submissions on the merits of an appeal within 45 days of leave to appeal being granted. The Appellant did not file any legal submissions. She submitted further medical reports to support her disability claim. The Respondent filed submissions. It took no position on the merits of the appeal, but provided a summary of the law relevant to the matter at hand.

[3] The Respondent's submissions included a detailed argument regarding what standard of review should be applied by the Appeal Division when reviewing a decision of the General Division. It contended that on questions of fact or mixed fact and law, the Appeal Division should apply a deferential standard of review, and on questions of law the Appeal Division should show no deference to the General Division but conduct its own analysis and determine if such an error has been made.

ISSUE

[4] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 52 of the Act provides that an appeal to the General Division of the

Tribunal must be made within 90 days of the reconsideration decision being communicated to a claimant. It also provides that this time can be extended, provided that the application is not made more than one year after the decision was communicated to the party.

[5] In this case, the application was made after the 90 day time to appeal, but within one year of the decision being communicated to the claimant. I must decide if the General Division properly exercised its discretion in deciding not to extend the time for the Appellant to file an appeal to the General Division.

ANALYSIS

[6] The Respondent issued its reconsideration decision denying the Appellant's disability pension claim on November 25, 2013. The Appellant filed an incomplete Notice of Appeal with the General Division of this Tribunal on March 4, 2014. She claimed that her materials were filed late because she was given the wrong forms at Service Canada. She subsequently filed the remaining documents that were required to complete the appeal. However, she completed the appeal after the time permitted to do so had expired. Therefore, the General Division had to decide whether to extend the time to file the appeal.

[7] This decision is a discretionary one. The decision of the Federal Court in *Canada (Minister of Human Resources Development) v. Gatellaro*, 2005 FC 883 provides guidance when making this decision. The General Division correctly set out the legal principles from this decision which included factors to be considered when deciding whether to extend time to file an appeal. It committed no error in this regard.

[8] I accept the conclusion of the General Division after it considered these factors, that the Appellant had an arguable case, a continuing intention to appeal and that there would be no prejudice to the Respondent if the appeal proceeded. The General Division also decided that the Appellant did not have a reasonable explanation for her delay in filing the appeal. These conclusions were made based on the evidence before the General Division. The General Division did not err in this regard.

[9] However, in *Canada (Attorney General) v. Larkman*, 2012 FCA 204 the Federal Court of Appeal stated that how the factors set out in the *Gatellaro* decision are to be weighed may differ in each case, and that other factors may be relevant. The interests of justice are to be a paramount consideration. The General Division did not err in considering the *Gatellaro* factors. However, the decision contained no analysis of how each of the factors was weighed. It appears that the fact that the Appellant did not have a reasonable explanation for her delay in filing the appeal was given more weight by the General Division. No explanation for this was given. One of the purposes of written reasons is to ensure that parties to a claim understand why the decision was made. Without any analysis of how the *Gatellaro* factors were weighed, this was not accomplished.

[10] Further, in *Larkman*, the Federal Court of Appeal decided that the most important consideration when deciding whether to extend the time to file an appeal is the interests of justice. The General Division decision contained no reference to this. There was no indication that this was considered in making the decision. This was an error in law.

[11] In *Newfoundland and Labrador Nurses' Association v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 the Supreme Court of Canada concluded that the reasons for a decision are to be looked at together with the outcome to determine if the decision falls within the range of possible outcomes that is defensible on the facts and the law. In this case, I am satisfied that the General Division decision is not defensible on the law. While I appreciate that the decision to be made in this matter was a discretionary one, it must be made after considering the relevant law. The General Division did not do so in this case.

[12] The appeal is allowed.

[13] Section 59 of the *Department of Employment and Social Development Act* sets out the remedies that the Appeal Division can give on appeal. It is appropriate in this case that the matter be referred back to the General Division for reconsideration. I am not able to give the decision that the General Division should have given as I have not heard the evidence.

[14] To avoid any potential apprehension of bias the matter should be considered by a different Member of the General Division and the decision refusing to grant an extension of time to file the appeal is to be removed from the record.

Valerie Hazlett Parker
Member, Appeal Division